United Nations AT/DEC/1117

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1117

Case No. 1225: KIRUDJA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas, on 15 October 2 narles M. Kirudja, a staff member of the United Nations, filed an Application, requesting the Tribunal, inter alia:

"7. ...

...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the production of all the relevant minutes of the meetings of the Appointment and Promotion Board [(APB)] in which the Applicant's candidacy to the D- 1 post of Chief, Publishing Service, Conference Services Division, UNOG, was discussed, ...

8. ... on the merits:

(a) *to rescind* the decision of the Secretary-General not to appoint the Applicant to the D-1 post of Chief, Publishing Service, but instead to re-circulate the vacancy announcement;

(b) *to order* that the Applicant be forthwith promoted to the D-1 level with retroactive effect from 1 April 1999, and that he be reassigned to a suitable post commensurate with his skills and qualifications;

(c) *to find and rule* that as a matter of law and equity the Joint Appeals Board erred in failing to properly adjudicate the Applicant's claims or to provide appropriate and adequate compensation for the harm done to the Applicant for violation of his rights under the Staff Rules and Regulations;

(d) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(e) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case; and

(f) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 14 March 2002 and periodically thereafter until 7 August 2002;

Whereas the Respondent filed his Answer on 7 August 2002;

Whereas the Applicant filed Written Observations on 27 November 2002;

Whereas the Respondent filed an additional statement on 3 July 2003;

Whereas, on 15 July 2003 , the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 15 August 1977, on a two-year fixed-term appointment at the P-2 level as Associate Transnational Corporations Affairs Officer, United Nations Centre on Transnational Corporations (CTC)/Information Analysis Division. At the material time, the Applicant was serving as Senior Finance officer, Office of Programme Planning, Budget and Accounts (OPPBA), Department of Administration Management.

On 31 March 1998, the Applicant applied for the advertised vacancy of Chief, Publishing Service, Conference Services Division, United Nations Office at Geneva (UNOG), a D-1 level position. The Director, Conference Services Division, recommended the Applicant and one other candidate for the post. The Departmental Advisory Panel (Department of General Assembly Affairs and Conference Services (DGAACS)) however, recommended a third candidate, Mr. A-Z. On 27 October, the Officer-in-Charge (OiC), recommended the Applicant. On 11 November, the Assistant Secretary-General, DGAACS, endorsed the recommendation of the OiC, Conference Services Division, of the Applicant.

On 27 January 1999, Ms. C., the Acting Director, Conference Services Division, endorsed the recommendation of the Departmental Advisory Panel to appoint Mr. A-Z. The following day, the Applicant was advised that the Department had recommended another candidate but that he could submit additional information relevant to his suitability for the position. He did so on 2 February, but expressed his concern about "a troubling confluence of facts that may cast a shadow on the independence of the Board to arbitrate impartially on this particular case". He explained that [Ms. C] had been a member of the APB at the time of its original consideration of his application and that, in making her 27 January endorsement, she had created a "conflict of an interest situation, casting a doubt on the impartiality and objectivity of the Board". In view of Ms. C.'s involvement in the APB, on 12 February, the APB asked the Director-General, UNOG, to endorse the recommendation. He responded on 23 February 1999, supporting the recommendation to appoint Mr. A-Z.

According to its written recommendation of 4 March 1999, the APB considered Ms. C.'s recommendation, but concluded that "[t]he Board was not in a position to support the recommendation of the Acting Director for the promotion of Mr.[A-Z], and instead recommends the transfer and promotion of [the Applicant] ...". In an attachment to its recommendation, the APB elaborated:

> "[h]aving carefully reviewed the qualifications of the applicants vis-à-vis the requirements of the post, the Board felt in view of his academic background, his extensive experience in administration, management and finance, [the Applicant] was the most suitable candidate.
>
> In making its recommendation, the Board was also aware that in a memorandum dated 27 October 1998, [the] Officer-in-Charge of Conference Services, UNOG had recommended the selection of [the Applicant] for the post. The Assistant Secretary-General for Conference Services ... had also conveyed his support for the candidacy [of the Applicant] in his memoranda of 11 November 1998 and 2 February 1999. The Board also took into consideration that [the Applicant] was still in need of placement."

The Assistant Secretary-General for Human Resources Management endorsed the recommendation of the APB on 9 March 1999. The Under-Secretary-General for Management, however, did not endorse the recommendation but remanded it to the APB on 10 March. On 25 March, the Under-Secretary-General for Management informed the APB as follows:

"Having reviewed the file I am not in a position to approve the recommendation and remand it to the Board for recirculation.

This action is taken in view of two issues, namely that the post in question, while operationally under the Department for General Assembly Affairs and Conference Services, is at the same time administratively under the authority of the Director General of the United Nations Office in Geneva. The two responsible departments should now agree to a joint recommendation. Furthermore, the now Officer-in-charge where the vacancy occurred, had been an active member of the Board at the time of the initial review by the Board of this case."

On 25 March 1999, the APB recommended that the vacancy be re-circulated, and approved by the Under-Secretary-General for Management on 5 April. On 14 April, the APB so informed the Applicant. The Applicant was not again invited to submit additional information.

On 22 April 1999, the Applicant requested administrative review of the decision to re-circulate the post.

On 25 June 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 4 November 1999, the APB recommended Mr. [A-Z] as the best qualified candidate for the post. The Assistant Secretary-General for Human Resources Management endorsed this decision on 11 November, and the Under-Secretary-General for Management approved the promotion of Mr. [A-Z] on 15 November to the UNOG D-1 position. The Director-General, UNOG, was informed accordingly on 23 November.

The JAB adopted its report on 15 June 2001. Its conclusions and recommendations read, in part, as follows:

"***Conclusions and Recommendations***

38. The Panel concluded that the administrative decisions to re-circulate the D-1 post, and as a result not to promote the Appellant to the D-1 post, was within the discretion of the Secretary-General, and that such discretion was properly exercised. It further concluded that there has been no violation of the Appellant's terms of appointment

39 The Panel made no other recommendations with respect to this appeal."

On 8 October 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had taken note of the JAB's findings and had decided to accept its conclusions and recommendation and to take no further action on his appeal.

On 15 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's right to full and fair consideration was compromised by the intrusion of extraneous considerations and gross procedural irregularities.

2. The Applicant's legitimate expectation of preferential consideration was overlooked.

3. The JAB erred in its narrow construction of the scope of the case, and made mistakes of fact and law.

Whereas the Respondent's principal contentions are:

1. The Applicant was properly considered for promotion, and his rights were not violated by the decision not to select and promote him to the D-1 post he sought.

2. The contested decision was not procedurally flawed, biased, improperly motivated or founded on extraneous factors.

3. The Applicant was not entitled to a promotion to the vacant D-1 post.

The Tribunal, having deliberated from 4 to 24 July 2003, now pronounces the following Judgement:

I. The Applicant appeals the Secretary-General's decision of March 10, 1999, which decision (1) rejected the recommendation by the Appointment and Promotion Board that the Applicant be promoted to the D-1 post in question and (2) ordered that the vacancy for the post be re-circulated. The Applicant claims that the Respondent violated administrative regulations and rules, abused his authority and demonstrated gross arbitrariness, which affected his non-promotion to the D-1 level.

The Applicant alleges that he was not fully and fairly considered for promotion to the D-1 post he sought and that the decision not to promote him was vitiated by extraneous factors and improperly motivated. The Applicant seeks to rescind the Respondent's decision to appoint a person other than himself to the disputed post and also seeks compensation for career damages and undue disruption of personal life as a result of the uncertainty stemming from the facts of the case.

II. This case concerns the Respondent's discretionary powers to promote and appoint United Nations staff.

The Tribunal recognizes that the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General. Thus, "qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion" (see Judgment No. 958, *Draz* (2001).

This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not absolute; the Administration's discretion shall be reviewed when there are allegations of abuse of discretion. (See Judgement No. 870 *Choudhury* and *Ramchandani* (1998)). Article 101 of the Charter and staff regulation 4.2 provide that "the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". In order to achieve this purpose, it is imperative that 'full and fair consideration' be given to all applicants for a post. (See Judgement No. 828, *Shampande* (1997) para. VI).) In *Shampande*, the Tribunal stated:

> "The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. In Judgement No. 447, Abbas (1989), the Tribunal further specified that 'reasonable' and 'measurable' were the standards applicable in such cases ... such consideration should to some measurable degree meet the criterion of "fullest regard" in a reasonable manner.' Full and fair consideration has previously been defined by this Tribunal as consideration that, "to some measurable degree meet[s] the criterion of 'fullest regard' in a reasonable manner'".

The burden of establishing that the Administration has failed to fully and fairly consider the Applicant's candidacy, however, does not fall on the Applicant. Rather, as the Tribunal held in Judgement No. 362, *Williamson* (1986), para. VII:

> "if once called seriously into question, the [Respondent] must be able to make at least a minimal showing that the [Applicant's] statutory right was honoured in good faith in that the [Respondent] gave it's 'fullest regard' to it".

In the matter at hand, the Respondent claims that the Applicant's candidacy was given full and fair consideration throughout the process and that it was not interfered with by the Administration. The Tribunal cannot agree. Indeed, it finds that the Applicant was denied, in several respects and in several instances, full and fair consideration of his candidacy.

III. The Tribunal first addresses the apparent conflict of interest created by Ms. C.'s participation in the selection process. The Respondent argues that the Applicant fails to provide evidence to support allegations that Ms. C. was biased and "relies merely on an assumption on his part." The Applicant argues, however, that Ms. C.'s participation in the process created a conflict of interest, thereby tainting the selection process.

In the past, the Tribunal has disapproved of potential conflicts of interest with respect to an APB where parties have assumed the roles both of advocate and disinterested third party, creating

> "either the reality or the appearance of being unable to function with the independence, objectivity and open-mindedness called for at the APB level. In short[,] this duality compromise[s] the fair treatment to which staff members are entitled in the consideration of their candidacy by the APB". (See Judgements No. 619, *De Rozario-Miller* (1993), para. VI, and, No.988 *Mezoui* (2000).

Within weeks of her participation in the APB, where it was assumed that she was an impartial evaluator of candidates, including that of the Applicant, Ms. C. was an advocate for a former colleague and friend, Mr. A.-Z., for the same position upon which she had ostensibly acted impartially. Ms. C. should have recused herself from further involvement in the determination of the appropriate candidate for the post, because even if she had not, in fact, compromised her impartiality, she had

created an appearance of impropriety, partiality and subjectivity. This conflict of interest was recognized by the APB and communicated to the Under-Secretary-General for Management. It was one of the reasons provided by the Under-Secretary-General in defense of his decision to re-circulate the position. Accordingly, the Tribunal finds that Ms. C.'s participation in the APB and subsequent role as advocate for another candidate against the Applicant was a conflict of interest that tainted the selection process and violated the rights of the Applicant to have his candidacy fully and fairly considered.

IV. The Tribunal next addresses the Secretary-General's rejection of the Applicant as the best candidate for the post. The Respondent argues that the Secretary-General is under no obligation to implement the APB's advisory recommendations.

The Secretary-General instituted an administrative structure, which includes the APB, mandated to make recommendations for the appointment and promotion of candidates who satisfy the vacancy requirements under Article 101.3 of the Charter. It is the Tribunal's understanding that the Secretary-General's intention in creating such a structure was two-fold: it maintains a system of checks and balances to assure both the Organization and staff members that the appropriate procedures were followed by the department concerned and the various review panels, and that the recommendation of the APB to the Secretary-General is not tainted by bias or prejudice; and it includes an assessment of whether the discretionary power of the Secretary-General was properly exercised within the limits of Article 101.3.

V. In his letter to the APB, in which he rejects the APB's recommendation of the Applicant and orders that the vacancy be re-circulated, the Under-Secretary-General for Management states the reasons for his actions. Specifically, he identifies two reasons for his decision: (1) in order for DGAACS and the Office of the Director-General, UNOG, under which the post is jointly administered to agree on a candidate and (2) in respect of the conflict of interest resulting from Ms. C.'s participation in the selection process. The Tribunal finds that the Under-Secretary-General's stated reasons for ordering the re-circulation of the post are not consistent with the evidence, and the re-circulation was merely a device to substitute Mr. A-Z for the Applicant, as the successful candidate. Based on the evidence, the Applicant was indeed agreed upon, at some point in the process by both DGAACS and UNOG,

before the APB recommended him. Even if, as the Under-Secretary-General apparently believed, the Applicant had been supported only by DGAACS, the re-circulation did nothing to remedy the problem. The evidence is clear that in the second evaluation, the only department selecting the candidate was UNOG; DGAACS did not participate. Thus, the re-circulation did nothing to remedy the lack of departmental agreement regarding the best candidate for the post. Instead, the re-circulation merely replaced one candidate who had the support of only one department (the Applicant, allegedly chosen only by DGAACS) with another candidate who had the support of only one department (Mr. A.-Z., in fact chosen only by UNOG).

VI. The re-circulation was also intended to "cleanse" the prior conflict of interest created by Ms. C.'s dual role in the application process. Merely re-circulating the post, however, while allowing Ms. C. again to play a critical role in the second selection process, did nothing to address the Under-Secretary-General's concern about her conflict of interest. Ms. C.'s partiality toward Mr. A.-Z. was well known, and she should have recused herself from the process, despite the fact that she might have had an interest in its outcome, as the supervisor of the successful candidate. Her participation in the second evaluation reflected a lack of impartiality and objectivity in the selection process, no less significant or damaging to the Applicant than in the first selection process.

VII. The Tribunal also finds that the second round of evaluation was itself procedurally flawed. The Applicant alleges, and the Respondent does not rebut, that the Applicant was not invited to provide additional information in support of his candidacy. This was in violation of the promotion guidelines in effect at the time, and the Applicant was thus denied the right to be fully and fairly considered.

VIII. For the reasons set forth above, the Tribunal finds that the Secretary-General's re-circulation of the post was an abuse of discretion, being merely a device to substitute one candidate for another. The re-circulation itself did nothing to remedy the violations of the Applicant's rights to full and fair consideration.

IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant compensation equivalent to 10 months net base salary; and

2. Rejects all other pleas.

(Signatures)

Mayer **Gabay**
Vice-President

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

/KIBUDJA